83-1205

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DEC 29 1983
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF

THE UNITED STATES OF AMERICA

No.

COMMONWEALTH OF PENNSYLVANIA,

Appellee,

vs.

ROBERT HICKS,

Appellant.

AMENDED APPENDIX

Appeal from the Order of the Supreme
Court of Pennsylvania dated October 19, 1983

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SWENSEN & PERER
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SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant	No. 1 W.D. Appeal Docket, 1983.
V.	Appeal from the Order of the Court of Common Please of Allegheny County, Criminal Division, at No. CC8203243A,
ROBERT HICKS	dated November 30, 1982, granting Appellee's Motion to Quash the Information.

JUDGMENT

ON CONSIDERATON WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of COMMON PLEAS OF ALLEGHENY COUNTY, be, and the same is hereby reversed and record remanded for trial.

BY THE COURT:

Carl Rice

Carl Rice, Esquire
Prothonotary

Dated: October 19, 1983

IN THE SUPREME COURT OF PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA, Appellant	No. 1 W.D. Appeal Docket, 1983.
V.	Appeal from the Order of the Court of Common Pleas of Allegheny County, Criminal
ROBERT HICKS	Division, at No. CC8203243A, dated November 30, 1982, granting Appellee's Motion to Quash the Information.
	ARGUED: September 13, 1983.

OPINION OF THE COURT

ROBERTS, C.J. FILED: OCTOBER 19, 1983

This is a direct appeal by the Commonwealth from an order of the Court of Common Pleas of Allegheny County which granted a pre-trial motion to quash an information charging appellee Robert Hicks with homicide by vehicle, 75 Pa. C.S. § 3732. The court of common pleas held that the homicide by vehicle statute is unconstitutional on the ground that it violates the equal protection clause of the fourteenth amendment to the Constitution of the United States and the prohibition against special legislation contained in article III, section 32 of the Constitution of the Commonwealth of Pennsylvania. We reverse the order of the court of common pleas and remand for trial.[1]

[Footnote 1 is on p.13]

The information filed against appellee alleges that on April 3, 1982, appellee, while intoxicated, entered Interstate Route 79 by driving his automobile the wrong way down an exit ramp, and that while travelling north in the southbound lanes of Interstate 79, appellee's vehicle struck an oncoming vehicle, killing one of its occupants. Appellee was charged with homicide by vehicle as well as driving under the influence of alcohol, 75 Pa. C.S. § 3731, driving in the wrong direction on a divided highway, 75 Pa. C.S. § 3311 (a), reckless driving, 75 Pa. C.S. § 3714, and driving while his operating privilege was suspended, 75 Pa. C.S. § 1543(a).[2]

At the time of the alleged offense, 75 Pa. C.S. § 3732 provided:

> "Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death."[3]

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[1]We hear this direct appeal pursuant to 42 Pa. C.S. §722(7), which provides that this Court shall have exclusive appellate jurisdiction in "[m]atters where a court of common pleas had held invalid as repugnant to the Constitution . . . of the United States, or to the Constitution of this Commonwealth, . . . any statute of this Commonwealth. . . ."

[2]These latter charges were not affected by the trial court's dismissal of the charge of homicide by vehicle.

[3]The Vehicle Code was amended by the Act of December 15, 1982, P.L. 1268, to create a new offense, homicide by vehicle while driving under the influence, 18 Pa. C.S. §3735. The amendment took effect on January 14, 1983, after the occurrence of the offense alledged in this case.

[237-3]

In *Commonwealth v. Field*, 490 Pa. 519, 417 A.2d 160 (1980), this Court held that under section 3732 the Commonwealth must show that the defendant "knew or should have known" that he engaged in the conduct claimed to be in violation of the Vehicle Code, and that, at the very least, death was a "probable consequence" of that conduct. *Commonwealth v. Field*, 490 Pa. at 525, 417 A.2d at 163. Accord, *Commonwealth v. Houtz*, 496 Pa. 345, 437 A.2d 385 (1981).

In declaring section 3732 unconstitutional, the court of common pleas proceeded on the assumption that the goal of the Legislature in enacting section 3732 was to reduce the number of fatalities on our highways. The Court concluded that section 3732 was irrational by accepting as true the view that "punishment of a negligent offender in no way implements [deterrence] since the negligent harmdoer is, by definition, unaware of the risk he imposes on society," Slip op. at 10, quoting Comment, *Is Criminal Negligence a Defensible Basis for Penal Liability?*, 16 Buffalo L.Rev. 749, 751 (1967) (footnotes omitted).[4]

Under the equal protection clause, the test of the validity of a statutory classification which does not implicate "fundamental interests" or affect with particularity a "suspect class" is whether the classification bears a rational relationship to a legitimate state interest. See, e.g., *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. 471, 97 S.Ct. 1898 (1977). This Court has held that the prohibition against special legislation contained in article III, section 32 of the Pennsylvania Constitution also requires that legislative classifications "have some rational relation to a proper state purpose." *Baltimore & Ohio Railroad Co. v. Dep't. of Labor & Industry*, 461 Pa. 68, 83, 334 A.2d 636, 643 (1975).

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[4]The court supported its conclusion by observing that the Legislature had available more effective means of achieving its objective. It is, of course, improper for a court to substitute its policy judgment for that of the Legislature. See, e.g., *Hodel v. Indiana*, 452 U.S. 314, 331-32, 101 S.Ct. 2376, 2386-87 (1981); *Daniel v. Family Life Insurance Co.*, 336 U.S. 220, 224, 69 S.Ct. 550, 553 (1949).

Although the court of common pleas properly framed the goal of the homicide by vehicle statute as the reduction of highway fatalities, the court improperly concluded that the classifications drawn by the statute are not rationally related to that goal. By focusing on drivers who know or should know that they are engaging in conduct constituting a Vehicle Code violation, of which death is a probable consequence, section 3732 seeks only to sanction those persons who should reasonably anticipate that their conduct is likely to produce death, in much the same manner as the law of torts imposes liability against only those wrongdoers who should reasonably have anticipated the harm resulting from their conduct. It has long been perceived that the imposition of liability for negligent conduct tends to improve the quality of social conduct. See W. Prosser, Law of Torts 14-16 (4th ed. 1971). As the judgment by the Legislature to borrow from concepts of tort law in imposing liability under section 3732 bears a rational relationship to the Legislature's goal, it must be concluded that the Legislature's enactment of section 3732 was a constitutional exercise of its lawmaking authority. Accordingly, the order of the court of common pleas holding unconstitutional the homicide by vehicle statute must be reversed and the record remanded for trial.[5]

Order reversed and record remanded for trial.

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[5]Appellee urges that 75 Pa. C.S. §3732 violates equal protection on the additional ground that the offenses of homicide by vehicle and involuntary manslaughter, 18 Pa. C.S. §2504, are classified as misdemeanors of the first degree, punishable by as much as five years' imprisonment, notwithstanding the different standards of proof for the two offenses. See *Commonwealth v. Houtz*, supra. Appellee, however, overlooks the fact that the class of individuals responsible for non-vehicle deaths which are unintentional and the class of persons whose violations of the Vehicle Code cause death are not similarly situated with respect to the homicide by vehicle statute's distinct purpose of reducing highway fatalities. The Supreme Court of Colorado rejected a similar challenge to a vehicular homicide statute in *People v. Hulse*, 192 Colo. 302, 557 P.2d 1205 (1976), holding that equal protection considerations are implicated only where the same criminal conduct is prescribed by both statutes.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA
CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	)	
	)	
v.	)	No. CC8203243
	)	
ROBERT HICKS	)	
	)	

OPINION

O'BRIEN, J.
February 24, 1983

Defendant, Robert Hicks, is charged at the above number with one count of violation of the Homicide by Vehicle Statute (75 Pa. C.S. §3732). He timely filed a motion to quash the criminal information, alleging the following:

> 5. The act of June 17, 1976, P.L. 162, No. 81, §1, effective July 1, 1977; 75 Pa. C.S.A. §3732, Homicide by Vehicle, violates the federal and Pennsylvania Constitutions because it imposes strict criminal liability without any requirement of mens rea or its equivalent, thereby depriving defendant of due process and equal protection of the laws.
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> 6. The legislature has designated homicide by vehicle as a misdemeanor of the first degree, thereby classifying it with involuntary manslaughter, 18 C.P.S.A. §2504, which requires proof of recklessness or gross negligence. There is no rational basis for classifying the the offenses equally; by doing so the legislature has exceeded its power, denied defendant equal protection and due process of law guaranteed by the federal and state constitutions, and subjects defendant to cruel and unusual punishment in violation of the Eights [sic] Amendment to the United States Constitution and Article 1, Section 13 of the Pennsylvania Constitution.

Oral argument was held on August 5 and November 30, 1982. On the latter date this writer granted defendant's motion for reasons which follow.

I

MENS REA

Section 3732 defines Homicide by Vehicle as follows:

> "Any person who unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic is guilty of homicide by vehicle, a misdemeanor of the first degree, when the violation is the cause of death."

Initially the court notes its disagreement with defendant's contention that Section 3732 is unconstitutional because it "imposes strict criminal liability without any requirement of mens rea." While that may have been the legislature's intent, our Supreme Court has held that the Commonwealth must prove the accused "knew or should have known" he or she engaged in the conduct constituting a violation of the underlying vehicle code section or local ordinance. *Commonwealth v. Field*, 490 Pa. 519, 525, 417 A.2d 160, 163 (1980). Thus, it appears the court has read into Section 3732 a simple negligence culpability requirement.[1]

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[1]Under Section 3732 the Commonwealth need not show criminal negligence as defined by the Crimes Code (75 Pa. C.S.A. §302(b) (4)). *Commonwealth v. Koch*, 297 Pa. Super. 350, 443 A.2d 1159 (1982).

II

RIPENESS

Subsequent to the Court's November 30, 1982, entry of the order quashing the information, the Commonwealth filed an Application for Reconsideration, arguing for the first time that defendant's equal protection arguements, "as they relate to the cruel and unusual punishment provisions of the Eighth Amendment to the United States Constitution and Article 1, Section 13 of the Pennsylvania Constitution," are not ripe for consideration.[2] For this proposition the Commonwealth cites *Commonwealth v. Lang*, 285 Pa. Super. 34, 426 A.2d 691 (1981).

In *Lang* the lower court quashed an information charging defendant with Vehicular Homicide on the basis it did not allege sufficient causation between his act and the victim's death. The Commonwealth appealed. Defendant cross-appealed, arguing, inter alia, Section 3732 imposes cruel and unusual punishment. The Superior Court refused to consider this argument, holding it was not ripe for review as defendant had been neither convicted nor sentenced. While *Lang* precludes consideration of defendant's cruel and unusual punishment argument, it does not speak to the issue of equal protection.

> "The proper procedure for challenging the validity of a criminal statute is to file a pretrial motion to quash the indictment. Obviously, the purpose of resolving constitutional challenges prior to trial is to conserve time and expense if the challenge is successful." *Commonwealth v. West*, 270 Pa. Super. 301, 311, 411 A.2d 537, 542-43 (1979) (Gates, J., concurring).

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[2]The Commonwealth's Application for Reconsideration was denied on December 29, 1982.

Defendant's equal protection argument is a facial attack on the constitutionality of classifying Section 3732 as a misdemeanor of the first degree. Constitutional challenges to Section 3732 were addressed on the merits in pre-trial appeals by our appellate courts in *Commonwealth v. Field*, supra, *Commonwealth v. Burt*, 490 Pa. 173, 415 A.2d 89 (1980), and *Commonwealth v. Spurgeon*, 285 Pa. Super. 563, 428 A.2d 189 (1981).

In *Commonwealth v. Danko*, 281 Pa. Super 97, 421 A.2d 1165 (1980), appellant was convicted of criminal solicitation and prostitution. On appeal one of her constitutional attacks on the prostitution statute was that it denied her

> "equal protection of the laws in violation of the Fourteenth Amendment because the prostitute's patron is guilty of only a summary offense under section 5902(e) while the prostitute is guilty of a misdemeanor of the third degree under section 5902(a). Cf. *Commonwealth v. Bonadio, Pa.*, 415 A.2d 47 (1980) (violation of equal protection found where statute made sodomy criminal depending on the defendants' marital status)."

The court held:

> "We may not consider appellant's constitutional arguments. *Although they clearly could have been raised in a pre-trial motion appellant filed no pre-trial motion contesting the constitutionality of section 5902.* See Pa. R. Crim. P., Rule 306. Perhaps her failure to raise her constitutional arguments before trial alone requires this court to find that she waived her facial constitutional challenges to the statute. See *Commonwealth v. Barone*, _____ Pa. Super. _____, 419 A.2d 457, 460-61 (1980) (Opinion by CERONE, P.J., joined by CAVANAUGH, J.); *Commonwealth v. Ashford*, _____ Pa. Super. _____, _____, 407 A.2d 1328, 1330-31 (1979), citing *Commonwealth v. Warren*, 475 Pa. 31, 379, A.2d 561 (1977)."

281 Pa. Super. 100, 421 A.2d 1167 (emphasis added)

However, the court was not required to find a waiver through appellant's failure to raise the equal protection argument pretrial since she also failed to make the argument during trial.

Hence, it appears from the foregoing authorities that not only was the equal protection issue in the present case ripe for consideration by this Court, but defendant's failure to raise it at this stage would probably have precluded him from raising it on appeal in the event of a conviction.

III

EQUAL PROTECTION

Under 18 Pa. C.S. §2504(a),

> "A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person."

> "The state of mind, or *mens rea*, which characterizes involuntary manslaughter is recklessness or gross negligence: a great departure from the standard of ordinary care evidencing a disregard for human life or an indifference to the possible consequences of the actor's conduct. *Commonwealth v. Polimeni*, 474 Pa. 430, 442, 378 A.2d 1189, 1195 (1977); *Commonwealth v. Kominsky*, 240 Pa. Super. 532, 539, 361 A.2d 794 (1976) . . .
>
> Conduct made unlawful by the Motor Vehicle Code is not necessarily the kind of 'unlawful act' included within the definition of involuntary manslaughter, for in many instances, the Code makes unlawful, acts of ordinary negligence."

> *Commonwealth v. Agnew*, 263 Pa. Super 424, 427, 398 A.2d 209, 211 (1979).

Since involuntary manslaughter is classified as a misdemeanor of the first degree (18 Pa. C.S. 2504 (b)), it carries a maximum sentence

of 2-1/2 to 5 years (18 Pa. C.S. §§1104, 1356 (b)). As stated previously Vehicular Homicide is likewise classified.[3] By enacting Section 3732 the legislature intended to "expand the scope of criminal liability for violations of the Vehicle Code causing death." *Commonwealth v. Field*, 490 Pa. at 525 n.4, 417 A.2d at 163 n.4. In *Commonwealth v. Houtz*, the court held that

> "This legislative 'expansion' was accomplished not by the elimination of any of the elements of the crime of involuntary manslaughter, but by a relaxation of the degree of proof of two existing elements: culpable conduct and causation. The crime of involuntary manslaughter, as charged here requires proof that the actor engaged in the Vehicle Code violation in a 'reckless or grossly negligent manner' and that the death was caused 'as a direct result.' 18 Pa. C.S. §2504. See *Commonwealth v. Clowser*, 212 Pa. Super. 208, 239 A.2d 870 (1968). By contrast, under the crime of homicide by vehicle, it must be shown only that the actor 'knew or should have known' that he engaged in the conduct claimed to be in violation of the Vehicle Code, and that, at the very least, death was a 'probable consequence' of the conduct.
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> *Commonwealth v. Field*, 490 Pa. at 525, 417 A.2d at 163." 469 Pa. 345, 348-9, 437 A.2d 385, 387 (1981)

In nonmotorist involuntary manslaughter cases the Commonwealth must likewise prove beyond a reasonable doubt that defendant's reckless or grossly negligent conduct caused the victim's death. *Commonwealth v. Moore*, 463 Pa. 317, 344 A.2d 850 (1975) (Criminal negligence could have been found where defendant placed a loaded gun in her purse and struggled with victim while defendant's and victim's hands were on gun); *Commonwealth v. Feinburg*, 433 Pa. 558, 253 A.2d 636 (1969) (recklessness found in sale of toxic sterno, where seller knew

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[3]The instant charge was filed against defendant prior to the effective date of Sentencing Code, 204 Pa. Code Ch. 03, 42 Pa. C.S.A. §9721.

purchasers were alcoholics who would drink it); *Commonwealth v. Gilliland*, 281 Pa. Super 354, 422 A.2d 206 (1980) (evidence insufficient to prove gross negligence where defendant, operating his motor boat on a lake, failed to observe decedent's boat approaching in time to avoid collision); *Commonwealth v. Youngkin*, 285 Pa. Super, 417, 427 A.2d 1356 (1981) (recklessness found where physician "prescribed Tuinal to the decedent in quantities and frequencies term irresponsible and totally inappropriate," ultimately causing her death, where decedent's abuse of the drug had been previously brought to the physician's attention.) 285 Pa. Super at 27, 427 A.2d at 1361.

The issue in the present case can be framed in the following manner: Are motorists prosecuted for causing accidental death being denied equal protection of the law, as compared with nonmotorists who cause accidental death, in that to prove a misdemeanor of the first degree against a motorist the Commonwealth need only prove that the victim's death was a probable result of defendant's simple negligence, whereas to prove a first degree misdemeanor against a nonmotorist in an accidental death case, the prosecution must prove the victim's death was a direct result of at least gross negligence on defendant's part?[4]

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[4]A motorist-nonmotorist equal protection argument was rejected by the Court of Common Pleas of Adams County on the basis that a "classification based on those persons subject to the provisions of the Vehicle Code and those persons not so subject . . . is rationally related to . . . safety on the highway." *Commonwealth v. Beams*, 10, D & C 3d 616, 617 (1978). One of the bases of the court's decision may have been its incorrect view that *criminal* negligence under 18 Pa. C.S. §302 is required for a vehicular homicide conviction. The same result was reached by the Court of Common Pleas of Potter County, with virtually no discussion of the issue. *Commonwealth v. Clark*, 17 D & C 3d 778, 781, (1981).

That equal protection is denied by section 3732 because it discriminates between vehicle code violators who cause death and those who do not was also rejected in *Beams*, supra, as well as in *Commonwealth v. Sloat*, 11 D & C 3d 745 (York County, 1979). See also, concurring opinion of Judge Popovich in *Commonwealth v. Koch*, supra.

In *Commonwealth v. Field*, supra, our Supreme Court declined to discuss the equal protection arguments raised by appellant in the lower court since they were not pursued on appeal.

In cases not involving a suspect classification the well-recognized applicable rule has been stated thus:

> "The Equal Protection Clause of [the state and federal] constitutions does not deny the State the power to treat different classes of persons in different ways, but does deny the right to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the particular statute. The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." *Commonwealth v. Bonadio*, 490 Pa. 91, 98, 415 A.2d 47, 51 (1980).

The Commonwealth argues a rational basis exists for such differential treatment of motorists "in that there existed a need for a distinct offense due to the reluctance of juries to convict for involuntary manslaughter." Commonwealth's Brief, p. 2. An increase in the number of first degree misdemeanor convictions for vehicle-related deaths can hardly supply the rational basis needed to justify Section 3732. Otherwise the statute could withstand constitutional attack even if interpreted as imposing strict criminal liability. A conviction cannot be an end in itself.

It cannot be denied that the reduction of vehicular-related accidental deaths is a desirable and proper legislative goal. However, this is equally true for nonvehicle-related accidental deaths. This having been said, the argument may, with surface appeal, be made that the carnage on our highways has reached alarming proportions, and that other methods of attempting to reverse this trend (such as prosecutions for involuntary manslaughter) have proven inadequate. However, this argument assumes that the existence of Section 3732 will significantly reduce the incidence of highway deaths, in that potential Vehicle Code violators will be deterred from such violations.[5] However,

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[5]It must be borne in mind that the forseeability of death or even bodily injury is not a relevant factor in determining guilt under Section 3732.

it has been correctly observed (in this writer's view) that:

> "The deterrence theory of criminal law is based on hypothesis that the prospective offender knows that he will be punished for any criminal activity, and, therefore, will adjust his behavior to avoid committing a criminal act. This theory rests on the idea of 'rational utility,' i.e., prospective offenders will weigh the evil of the sanction against the gain of the contemplated crime. However, punishment of a negligent offender in no way implements this theory, since the negligent harm-doer is, by definition, unaware of the risk he imposes on society. It is questionable whether holding an individual criminally liable for acts the risks of which he has failed to perceive will deter him [or others] from failing to perceive in the future."
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> Comment, *Is Criminal Negligence a Defensible Basis for Penal Liability?* 16 Buffalo L. Rev. 749, 751 (1967) (footnotes omitted).[6]

It simply defies common sense, for example, that motorists will be deterred from forgetting to "discontinue" their turn signal "immediately upon completing [a] turn," because they face a possible five years in jail in the extremely unlikely event someone dies as a result of such violation. (75 Pa. C.S. §3334(d)).[7] It should be obvious that more effective methods of deterring Vehicle Code violations exist, such as automatic license suspension or mandatory and stiffer fines for a wider range of traffic offenses. For more serious violations, such as reckless driving or excessive speeding resulting in death, a first degree mis-

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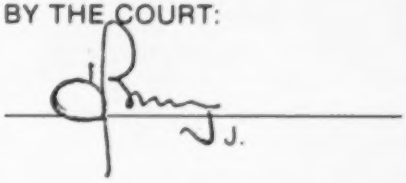
[6]For a scholarly treatment on the same subject, see Hall, *Negligent Behavior Should Be Excluded From Penal Liability*, 63 Colum. L. Rev. 632, 641 (1963).

[7]The underlying Vehicle Code violations charged in the instant case are Driving Under the Influence of Alcohol (§3731), Driving on the Wrong Side of the Roadway (§3311), and Reckless Driving (§3731). However, defendant is attacking Section 3732 "on its face," and not merely "as applied" to him. *Commonwealth v. Bonadio*, supra. The Commonwealth has not argued defendant lacks standing except to the extent he has not yet been convicted or sentenced. See II, supra, of this Opinion.

demeanor classification may pass constitutional muster. Such measures may not be a panacea, but at least they make more sense than saying to the motorists on our highways: "You are entitled to drive recklessly three times with virtually no chance of imprisonment, minimal fines and no license suspension,[8] but if you are lawfully traveling 36 miles per hour and you change lanes after signaling for only 200 feet prior to doing so,[9] and someone dies as a result, you may do hard time with ax murderers."

Accordingly, the criminal information against defendant was properly quashed as violating his rights under the United States and Pennsylvania constitutions.

BY THE COURT:



J.

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[8]Three points are assessed against a driver for reckless driving. 75 Pa. C.S. §1535. Upon accumulation of 11 points (the first time), PennDot will suspend the license five days for each point. 75 Pa. C.S. §1539.

[9]75 Pa. C.S. §3334(b).

THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant	)	
vs.	)	No. 3 W.D. Appeal Docket, 1983
ROBERT HICKS, Appellee	)	

NOTICE OF APPEAL

Defendant, Robert Hicks, hereby appeals to the Supreme Court of the United States of America from the Order and Judgment of the Supreme Court of Pennsylvania entered on the 19th day of October, 1983. This appeal is taken pursuant to 28 U.S.C.S. §1257.

SWENSEN & PERER

Peter B. Skeel, Esquire

CERTIFICATION OF SERVICE

I hereby certify that I am this 28th day of October, 1983 serving the following persons by first class mail, postage prepaid, which service satisfies the requirements of Rule 28.

The Honorable Leroy S. Zimmerman
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